



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,252	03/22/2004	Mark R. Kirkland	1795.KIRK.PT	1923

26986 7590 11/15/2006

MORRISS O'BRYANT COMPAGNI, P.C.  
136 SOUTH MAIN STREET  
SUITE 700  
SALT LAKE CITY, UT 84101

EXAMINER
----------

THAKUR, VIREN A

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 11/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/806,252	<b>Applicant(s)</b> KIRKLAND, MARK R.	
	<b>Examiner</b> Viren Thakur	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) 18-22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 and 23-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>6/11/04</u> . | 6) <input type="checkbox"/> Other: ____.  |

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-17, 23-26, drawn to a container sized and shaped for being dispensable from a vending machine, classified in class 426, subclass 120.
  - II. Claims 18-22, drawn to a method for dispensing food products, classified in class 426, subclass 394

The inventions are distinct, each from the other because of the following reasons:

2. Inventions of Group II and Group I are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the container of Group I can be used in a materially different process other than that recited in the claims of Group II. For example, the container does not need to be placed within a vending machine and selected

Art Unit: 1761

from a vending machine. The container can be packaged and subsequently placed on a shelf in a grocery store.

3. Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art due to their different classification and thus would require a different field of search. Thus, restriction for examination purposes as indicated is proper.
4. During a telephone conversation with Julie Morriss on November 1, 2006 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-17 and 23-26. Affirmation of this election must be made by applicant in replying to this Office action. Claims 18-22 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

### ***Drawings***

5. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description:

Art Unit: 1761

- a. Page 11, paragraph 0028 cites container 12 (FIGS. 1, 3, or 4).  
Figure 4 is not labeled with item 12.
- b. Page 15, paragraph 0037 cites item "...the food product 58." The food product in Figure 3, is not labeled item 58.
- c. Page 15, paragraph 0037 cites the compartments 40,44 may each be structured." The second compartment is not labeled item 44.
- d. Page 17, paragraph 0042 cites the lid 84. The lid in Figure 4 is not labeled item 84.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 112***

- 6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

Art Unit: 1761

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-9, 14 and 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

e. Claims 1-9, 14 and 16 recite the limitation "sandwich-like." Although described in the specification, the definition of sandwich-like does not provide the metes and bounds to further limit the claim language. It is unclear as to what type of products a sandwich-like product is referring since bagels and tortillas are only examples of unconventional type sandwiches.

f. Claims 1-9 further recite the limitation "selected shelf-life." Regardless of the type of product, every food product has a selected shelf-life; therefore it is unclear as to what is meant by a sandwich-like product having a selected shelf-life.

g. Claims 2 and 3 recite the limitation "bread-like." It is unclear as to what types of products are considered bread-like. It is further unclear as to the scope of the term bread-like. For example, two pieces of the same food product that are placed above and below a second food product can be considered bread-like since the two pieces act like bread for a sandwich. Alternatively, any product that is made of grain can be considered bread-like.

Art Unit: 1761

- h. Claim 7 recites the vendable non-beverage food product and a disparate food product that is a non-beverage. A disparate food product that is "non-beverage" is not further limiting since the preamble to independent claim 1, from which claim 7 depends, already states that the food product whether comprising one or more product is non-beverage.
- i. Claim 8 recites an open-ended group comprising savory snacks, chips, nuts, cookies, candy, yogurt, gelatinous desserts or dairy-containing desserts. Since the group is open-ended, it is unclear as to whether other food products can be considered within the group. The language "selected from the group comprising" is open-ended language that does not limit the claim to the disparate food products mentioned.
- j. Claim 26 recites the limitation "utilitarian." It is not clear as to what is meant by utilitarian since under 35 U.S.C 101, all patentable inventions must have utility.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Art Unit: 1761

9. Claims 1-4, 6, 9-11, 13-14, and 16-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Nedblake Jr. (US 5664671). As recited in instant claims 1-4, 10 and 11, Nedblake, Jr. discloses a container sized and shaped for being dispensable from a vending machine structured to vend containerized beverages (Column 2, Line 47-50), said container having a food product enclosing portion (Figure 2, Item 14), a top (Figure 2, not labeled – see top of item 14), a bottom (Figure 2, not labeled – see bottom of item 14) and an opening mechanism for accessing the interior of said food product-enclosing portion (Figure 2, Item 34; Column 2, Lines 7-16); and a sandwich like product contained within (Figure 2, Item 36; Column 2, Lines 5-7, Lines 43-44). Since Nedblake Jr. disclose a sandwich, said sandwich contains bread (Figure 2, not labeled – see above item 36) and a filler material (Figure 2, Item 36) wherein said filler material is in contact with said bread like portion (Figure 2, not labeled – see item 36). Since the sandwich like product must have a shelf life of up to three years, this includes any time period from zero to three years. It is known that sandwich like products have a shelf life within the range of zero to three years. As recited in instant claim 6, Nedblake Jr. discloses wherein said container is divided into a first compartment (Figure 1, Item 12) and a second compartment (Figure 1, Item 14), said sandwich like product (Figure 2, Item 36) being contained in one of said first compartment or second said compartment and the other compartment containing a disparate food product (Figure 2, Item 28). As recited in instant claims 9 and 13-14 and 16-17, Nedblake Jr. discloses wherein said vendable container



Art Unit: 1761

comprises separable compartments (Column 2, Lines 44-47), each compartment comprising a food product enclosing portion (Figure 2, Item 28 and Item 36), a bottom (Figure 2, Item 20 and not labeled bottom of unitary package) and an opening mechanism for accessing the interior of each said compartment (Figure 2, Item 22 and Item 34). Nedblake Jr. discloses a sandwich like product as one of said products (Figure 2, Item 36) and wherein one of said disparate food products is a beverage (Figure 2, Item 28).

10. Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Feldmeier et al. (US 6048558). Feldmeier et al. disclose a container having a food product enclosing portion (Figure 1, Item 23) a top (Figure 1, Item 45), a bottom (Figure 1, Not labeled – see below item 40) and an opening mechanism for accessing the interior of said food product-enclosing portion (Figure 1, Item 43 and Item 30); and a sandwich like product (Figure 1, Item 13; Figure 3, Item 13 and 11; Column 2, Lines 56-60) contained within said container and said sandwich like product having a selected shelf-life. Since the container comprises perishable goods, it is known that said package has a shelf life. Feldmeier et al. further disclose wherein said sandwich like product comprises a bread like portion (Figure 3, Item 13) and a filler material (Figure 3, Item 11) and wherein said filler is in contact with said bread like portion (Figure 3). As recited in instant claim 4, said sandwich-like product has a shelf life of up to three years. The disclosed range includes any time period from zero years to three years. As

recited in instant claim 5, Feldmeier et al. disclose a wrapper for said sandwich-like product (Figure 1, Items 12 and 14). As recited in instant claim 6, said container is divided into a first compartment (Figure 1, Item 23) and a second compartment (Figure 1, Item 22) wherein said second compartment contains a disparate food product (Figure 1, Item 34). Thus Feldmeier et al. disclose wherein said disparate food product is a non-beverage, and as recited in instant claim 8, said disparate product can be candy (Column 4, Lines 30-42). With regard to being sized and shaped to be vended in a beverage vending machine, Sandwich Vending Machines ([www.tripleaservices.com/html/sandwich.htm](http://www.tripleaservices.com/html/sandwich.htm)) provide evidence of vending machines that dispense both beverages and non-beverage comestibles. Therefore, it is interpreted that the packaged container of Feldmeier et al. is sized and shaped to be vended from a beverage vending machine. Griesbach et al. (US 5312634) is referenced as further evidence that multi-compartment containers are vendable.

11. Claims 10-13 are rejected under 35 U.S.C. 102(b) as being anticipated by Bezek et al. (US 6472007). Bezek et al. disclose a container that is vendable from a beverage vending machine (Column 3, Lines 47-64), having a food product enclosing portion (Figure 9b, Items 910 and 915), a top (Figure 9a, Not labeled – see top of container), a bottom (Figure 9a, Not labeled – see bottom of container) and an opening mechanism for accessing the interior of said food product-enclosing portion (Figure 9b, Item 925) and at least two disparate food products

contained within said container (Column 7, Line 65 to Column 8, Line 25). Bezek et al. disclose separated compartments (Figure 9b) and a moveable partition member (Figure 2a, Item 220) that separates a single food product-enclosing portion (Figure 2a, Item 202). Bezek et al. further disclose compartments (Figure 9b, Item 910 and Item 915) each comprising a food product enclosing portion, a bottom and an opening mechanism (Figure 9b, Item 920 and 925) for accessing the interior of each compartment.

12. Claim 23, 24 and 25 rejected under 35 U.S.C. 102(b) as being anticipated by Sayre (US 2433926). Sayre discloses a vendable container (Column 1, Lines 1-4) having a product enclosing portion (Figure 2), a top (Figure 1 Item 7), a bottom (Figure 2, See below Item 2) and an opening mechanism for accessing the interior of said product enclosing portion (Figure 2, Item 10); and at least two disparate products contained within said container (Figure 4, Item 12; Figure 2, see product within container). Sayre thus discloses wherein one of at least two disparate products is a comestible (Column 3, Lines 1-2) and wherein one of said at least two disparate products is a non-comestible (Figure 4, Item 12).
13. Claim 23-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Howes et al. (US 5056659). Howes et al. discloses a container typically used for holding liquids such as soda (Figure 7). Such containers are well known to be vended in vending machines. Said container has a product enclosing portion (Figure 7,

Art Unit: 1761

Item 20), a top (Figure 7, Item 43), a bottom (Figure 7, not labeled – see bottom of container) and an opening mechanism for accessing the interior of said product enclosing portion (Figure 7, Item 42). Howes et al. discloses two disparate products within said container (Figure 7, Item 78 and Item 30) wherein at least one of said two disparate products is a comestible (Figure 7, Item 30) and wherein one of at least two disparate products is a non-comestible (Figure 7, Item 78).

### ***Claim Rejections - 35 USC § 103***

14. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Art Unit: 1761

15. Claim 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nedblake Jr. (5664671) in view of Sanford (US 1830246). Nedblake Jr. disclose as cited above. Nedblake Jr. is silent in teaching wherein said sandwich like product is enclosed in a wrapper and wherein said disparate food product is a non-beverage.

With regard to claim 5, Sanford discloses using a wrapper to enclose a sandwich (Figure 4, Item 5; Lines 45-53). Thus, Sanford provides evidence to one having ordinary skill in the art that it would have been obvious to enclose said sandwich in a wrapper for the purpose of ensuring its freshness.

Additionally, it would have been obvious to wrap the sandwich of Nedblake Jr. since providing wrapping assists in maintaining the integrity of the sandwich and the components within the sandwich. Thus, the movement during transport or vending will not ruin the appearance of the sandwich.

With regard to claim 7, Sanford encloses a sandwich like product (Figure 4, Item 4) and a non-beverage disparate food product (Figure 3, Item 7; Lines 65-68). It is known to one having ordinary skill in the art to put condiments, such as mustard or relish into sandwiches. Sanford provides evidence that it is known to package a sandwich-like food product with a non-beverage disparate food product, such as candy or a condiment. Since Nedblake Jr. vends a sandwich with a complementary product such as a beverage, it would have been obvious to modify Nedblake Jr. to provide a non-beverage food product as taught by

Art Unit: 1761

Sanford for the purpose of providing a complimentary food product to the sandwich.

16. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Nedblake Jr. (US 5664671). Nedblake Jr. disclose as cited above. Nedblake Jr. is silent in teaching wherein another of said disparate food products is cookies. Since Nedblake Jr. discloses juice and pastries as a combination of food it is interpreted that Nedblake Jr. discloses cookies. However, Nedblake Jr. teaches wherein said vendable container comprises separable compartments (Column 2, Lines 44-47), each compartment comprising a food product enclosing portion (Figure 2, Item 28 and Item 36), a bottom (Figure 2, Item 20 and not labeled bottom of unitary package) and an opening mechanism for accessing the interior of each said compartment (Figure 2, Item 22 and Item 34). Nedblake Jr. discloses a sandwich like product as one of said products (Figure 2, Item 36) and wherein one of said disparate food products is a beverage (Figure 2, Item 28) and another of said disparate food products is a pastry (Column 2, Lines 43-48). Thus, Nedblake Jr. suggests to one of ordinary skill in the art to provide a complete meal that consists of a main course, a beverage and a confectionary food product (i.e. dessert). Including cookies in the vendable sandwich packaging would have been obvious since such pastries are well known to be vended and further complement sandwiches as a dessert.

Art Unit: 1761

17. Claim 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Howes et al. (US 5056659). Howes et al. disclose as cited above. The embodiment of Howes et al. cited above is silent in teaching wherein at least two disparate products are both utilitarian, non-comestible products are vended. With regard to instant claim 26, an alternate embodiment of Howes et al. discloses wherein the container comprising a first non-comestible product can be used to hold liquids such as bleach, detergents and automotive oils (Column 10, Lines 49-65), which are considered non-comestible products. Non-comestible containing bottles, such as detergent are well known to be dispensed from vending machines. Common places for providing such vending machines are at hotels and Laundromats so that guests would not need to carry laundry detergent with them. Furthermore, Howes et al. discloses wherein said bottles can be constructed of plastic, which is commonly used for vending liquid holding containers. Therefore, since Howes et al. structure said bottle from plastic that takes the shape of a commonly dispensed beverage container, it would have been obvious to vend the combination of non-comestible utilitarian products.

### ***Conclusion***

18. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 2604976 discloses a combination liquid and food container can wherein the liquid and food compartment are separable. US

Art Unit: 1761

4703849 and US 3514029 disclose a vendable combination bread and wine container. US 5279841 discloses a combination can wherein one compartment comprises a liquid and the other comprises either a complementary liquid or non-liquid food item. US 5312634 discloses a vendable compact compartmentalized food package. US 6779664 discloses a container for dispensing a wrapped sandwich. US 6955028 discloses a multiple food product container can wherein the two food products can be a beverage and a non-beverage food product or a non-beverage food product such as chips and a second non-beverage food product such as dip. US 2679281 discloses separable cans that each contain non-beverage food products. US 6531116 discloses two non-food product in the shape of a bottle. US 6830147 discloses a container comprising a food product and a non-food product. Sandwich Vending Machines and Enterprise Vending disclose vending machines that dispense both beverages and food products. 20020189966 discloses a vendable container holding a detergent and a softener.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax



Art Unit: 1761

phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Viren Thakur  
Examiner  
Art Unit: 1761



**KEITH HENDRICKS**  
**PRIMARY EXAMINER**